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Civil Procedure: Commentary

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CIVIL PROCEDURE

COMMENTARY

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The 1979-80 Second Circuit term produced few major surprises in the area of civil procedure. There were a spate of decisions on the application of state statutes of limitation to federal claims where Congress has been silent on appropriate time limitations.[1] The term also spawned the usual number of clarifying opinions on federal removal,[2] jurisdiction of various types,[3] and forum non conveniens.[4] Selective description and analysis of these cases is left to others.[5]

For purposes of this Commentary, "civil procedure" is defined broadly to include the rules of trial, that is, the evidence principles which govern litigation. Attention is invited to the sometimes nebulous boundary between the Federal Rules of Civil Procedure and the more recently enacted Federal Rules of Evidence.[6] This introduction reports on how doctrines of evidence have been used by the judiciary to affect traditional realms of civil procedure. Two examples will be explored: First, the use of the evidence rules of relevance to impose fixed limits

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[1] Taylor v. Mayone, 626 F.2d 247 (2d Cir. 1980); Mitchell v. United Parcel Serv., Inc., 624 F.2d 394 (2d Cir. 1980); Santos v. United Broth. of Carpenters, 619 F.2d 963 (2d Cir. 1980).

[2] White v. Wellington, 627 F.2d 582 (2d Cir. 1980); R.G. Barry Corp. v. Mushroom Makers, Inc., 612 F.2d 651 (2d Cir. 1979).

[3] Braman v. Mary Hitchcock Memorial Hosp., 631 F.2d 6 (2d Cir. 1980), and Covington Indus., Inc. v. Resintex, A.G., 629 F.2d 730 (2d Cir. 1980) concerned jurisdiction over the person of defendants. Johnson v. University of Bridgeport, 629 F.2d 828 (2d Cir. 1980) and United States v. Bedford Assoc., 618 F.2d 904 (2d Cir. 1980) involved subject matter jurisdiction, original and appellate.

[4] Manu Int'l, S.A. v. Avon Prod., Inc., 641 F.2d 62 (2d Cir. 1981) (argued during the 1979-80 term); Calavo Growers of Calif. v. Generali Belgium, 632 F.2d 963 (2d Cir. 1980).

[5] For an excellent discussion of White v. Wellington, 627 F.2d 582 (2d Cir. 1980) see Comment, *An Expensive Interpretation of the Civil Rights Removal Statute — One Step Too Far*, 47 BROOKLYN L. REV. 739 (1981).

[6] Congress enacted the Federal Rules of Evidence on January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1929 (1975).

on the duration of jury trials in protracted cases. Second, the impact of rules regarding preparation of testimony upon pretrial discovery of attorney work product.

I. Aggressive Use of Relevance Principles to Manage Litigation

As the complexity of federal litigation increases, lengthy civil trials become more frequent. This unfortunate situation is further aggravated when the parties in a complicated antitrust, securities, or patent litigation demand a trial by jury.[7] This breed of complex, protracted litigation poses severe administrative problems for the trial judge. When adversaries measure the time for presentation of their cases in years rather than weeks, their dispute has dire consequences in terms of judicial economy. It dislocates the court's docket and impacts adversely upon other cases and litigants. There is concern in the legal community about whether such extended service can be required of citizens summoned for jury duty[8] and about whether lay persons can understand the mass of technical data presented at such trials.[9] In these situations the judicial tendency is to impose time limits on case presentation[10] and to limit the number of witnesses called in an effort to shorten and simplify the litigation.[11] This is accomplished pursuant to the inherent power of courts to promote economies of trial and to manage crowded calendars.[12]

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[7] MCI Communications Corp. v. American Tel. & Tel. Co., 85 F.R.D. 28, 32 (N.D. Ill. 1979). *See also* Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 Conn. L. Rev. 775 (1978).

[8] *See In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1086 (3d Cir. 1980) ("The long time periods required for most complex cases are especially disabling for a jury. A long trial can interrupt the career and personal life of a jury member and thereby strain his commitment to the jury's task."); Note, *supra* note 7 at 776-77.

[9] Crane Co. v. American Standard, Inc., 490 F.2d 332, 343 (2d Cir. 1973) ("[T]he task of calculating what damages . . . may have [been] suffered . . . would demand prodigies of prophecy and measurement beyond the capacity of jurors and perhaps of a judge."). *See In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1086 (3d Cir. 1980); ILC Peripherals Leasing Corp. v. International Business Mach., 458 F. Supp. 423, 447-48 (N.D. Cal. 1978). *See also*, Margolis & Slavitt, *The Case Against Trial by Jury in Complex Civil Litigation*, 7 Litigation 19 (1980).

[10] *E.g.*, MCI Communications Corp. v. American Tel. & Tel., Inc., 85 F.R.D. 28, 31-32 (N.D. Ill. 1979); SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 15 (D. Conn. 1977).

[11] *E.g.*, United States v. International Business Mach., 87 F.R.D. 411, 420-22 (S.D.N.Y. 1980).

[12] *See* Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962) ("The authority of a

The pre-trial conference procedure embodied in Federal Rule of Civil Procedure 16[13] envisions broad judicial authority to simplify issues and to take action to dispose of issues. However, this power is not without its limits. May the trial court properly achieve economies at the price of excluding relevant evidence?

The search for authority to expedite trials often uncovers the Federal Rules of Evidence. Rule 611 comes quickly to mind. It allows the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . . ."[14] However, this provision is limited by its terms to matters of sequence. It grants no express authority to eliminate whole segments of evidence or groups of witnesses. Therefore, the courts[15] have turned to rule 403 of the Federal Rules of Evidence which authorizes the exclusion of concededly relevant evidence if "its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[16]

Rule 403 is clearly a proposition of great flexibility. It stands as a monument to trial court discretion. But can this rule be used to create and enforce blanket rules regarding length of trial and to set time limits for direct and cross-examination of witnesses? An increasing number of cases answer affirmatively.

In *United States v. International Business Machines,*[17] the defendant asked to call 124 additional witnesses to lay the testimonial foundation for documents which, though proferred, had been excluded on Government objection. The court refused on a number of grounds and added that "[p]articularly in a protracted case, rule 403 may serve as a predicate for [the] imposition of blanket limits on a party's right to introduce evidence . . . ."[18]

There is other authority to support the proposition that rule

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court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power" governed not by rule or statute. . . .").

[13] FED. R. CIV. P. 16 provides for a pre-trial conference at the discretion of the judge to consider, *inter alia,* simplification of the issues, admissions of facts and documents to avoid unnecessary proof and the limitation on the number of expert witnesses.

[14] FED. R. EVID. 611.

[15] *See, e.g.,* United States v. International Business Mach., 87 F.R.D. 411, 415 (S.D.N.Y. 1980); SCM Corp. v. Xerox Corp., 77 F.R.D. 10, 13 (D. Conn. 1977).

[16] FED. R. EVID. 403.

[17] 87 F.R.D. 411 (S.D.N.Y. 1980).

[18] *Id.* at 415.

403 of the Federal Rules of Evidence may be utilized by the court to control the duration of a trial. In *SCM Corp. v. Xerox Corp.*,[19] the trial judge acted after 14 weeks of trial. This private antitrust case was supposed to last about four months. When it became apparent that it would take at least seven months to present the case, the court concluded that it had an obligation to the proper administration of justice in its district to take appropriate action to curtail the length of the trial. Noting that "[a]n antitrust suit . . . is not a life's work,"[20] the trial judge, without considering individual pieces of evidence, imposed an absolute limit on the number of trial days available to the plaintiff to conclude presentation of his case.[21] His authority for this position was rule 403.[22]

A similar result was reached in *MCI Communications Corp. v. American Telephone & Telegraph Co.*[23] This time the court acted before the trial began. When informed by the defendant that this complex antitrust case would take 8 to 18 months to try, the trial judge stated that "the repercussions on the remainder of my calendar would be serious and longstanding."[24] The court, by pretrial order, imposed a 26 day limit on each side's case-in-chief and limited cross-examination of each witness to approximately the time taken for direct examination. Time limits were imposed "[w]ithout intending to pass upon any evidence questions at this time. . . ."[25] The court's opinion relied heavily on rule 403 and the decision in *SCM Corp. v. Xerox Corp.*[26]

This use of rule 403 by the courts represents a considerable stretching of the language of the rule. Granted, rule 403 allows the trial court considerable discretion in evaluating evidence. Nonetheless, the rule envisions that exclusion will follow an evaluation of the proferred testimony or documents. It requires that the court first assess "probative value" of the evidence and then determine whether its probative value is "substantially out-

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[19] 77 F.R.D. 10 (D. Conn. 1977).

[20] *Id.* at 14.

[21] *Id.* at 15.

[22] *Id.* at 13. The court also relied on FED. R. CIV. P. 1, which provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." *Id.*

[23] 85 F.R.D. 28 (N.D. Ill. 1979).

[24] *Id.* at 29.

[25] *Id.* at 30.

[26] 77 F.R.D. 10 (D. Conn. 1977).

weighed" by "considerations of undue delay."[27] Neither the court in *American Telephone & Telegraph,* nor the court in *SCM* ruled on individual pieces of evidence. Rather they imposed on counsel the responsibility for selection of the most probative items from the mass of otherwise admissible evidence.[28] In some cases, time limits were imposed in reliance on factors having little to do with the case at issue such as the condition of the court's docket and the impact of a lengthy trial on other litigants in other pending cases.

So construed, rule 403 adds a potent weapon to the power of the trial judge to manage litigation. Perhaps the most dramatic example of its use is *United States v. Algie.*[29] There the District Court for the Eastern District of Kentucky invoked rule 403 to override the precise language of a statute. The Jencks Act[30] requires that when a Government witness testifies against the accused in a criminal case, any statements by that witness in the hands of the prosecution must be delivered to defense counsel. However, the statute expressly provides that production be *after* the witness has testified on direct examination.[31] This provision in the Jencks Act is troublesome. It normally requires a recess after direct examination to permit defendant's attorney to study the statement.[32] Earlier disclosure by the prosecution would expedite the trial. In *Algie* the trial judge ordered the Government to produce the prior statements of its witnesses in advance of testimony.[33] Relying on the precise timing provisions of the Jencks Act, the United States Attorney refused. The trial court declined to use the drastic remedy of contempt. Instead, relying on rule 403, the court decreed that no Government witness would be permitted to testify unless the witness' statement had

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[27] FED. R. EVID. 403.

[28] MCI Communications Corp. v. American Tel. & Tel., Inc., 85 F.R.D.. at 30; SCM Corp. v. Xerox Corp., 77 F.R.D. at 13.

[29] 503 F. Supp. 783 (E.D. Ky. 1980).

[30] 18 U.S.C. § 3500 (1976).

[31] *Id.* § 3500(b).

[32] *Id.* § 3500(c). Section 3500(c) provides in relevant part that "[w]henever any statement is delivered to a defendant pursuant to this section, the court, in its discretion, upon application of . . . defendant, may recess proceedings . . . for such time as it may determine to be reasonably required for the examination of such statement . . . and his preparation for its use in the trial." *Id.*

[33] 503 F. Supp. at 785.

been previously supplied to defense counsel.[34] Enactment of the Federal Rules of Evidence gave the rules statutory status. Since they were enacted after the Jencks Act, the court concluded that rule 403 supersedes the Jencks Act to the extent it is inconsistent.[35] The court then found in rule 403 the power to order production of government statements in advance of witness testimony.[36]

Decisions now support the proposition that rule 403 may be used to achieve litigation economies and that it is not just the particular case that is to be considered.[37] Crowded dockets and other pending matters may justify use of rule 403 to impose time limits. The court in *Algie* generalized the effect of recent cases when it stated that "[t]he waste of time criterion [of rule 403] 'can be used to limit the number of witnesses, to restrict the amount of questioning, . . . to halt the amount of evidence, or to achieve any other goal that finds its basis in considerations of time.' "[38]

II. Impact of Witness Preparation Upon Work Product and Privilege Doctrines

Rule 612 of the Federal Rules of Evidence provides that if a witness uses a writing to refresh his memory while testifying, the adverse party is entitled to have the writing produced, to inspect it, to use it on cross-examination and to introduce in evidence those portions of the writing which relate to the testimony of the witness.[39] There is nothing particularly striking about this. Rule 612, however, goes on to state that, in the discretion of the court, such production and use by the adverse party may apply even to writings which the witness uses to refresh his memory "before

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[34] *Id.* at 786.

[35] *Id.* at 799.

[36] *Id.*

[37] *See, e.g.*, Geders v. United States, 425 U.S. 80, 87 (1976) ("If truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings."); Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433, 435 (E.D. Pa. 1978) ("Time limits, whether embodied in the Rules of Civil Procedure or in the order of a court are designed to expedite the orderly movement and disposition of litigation. . . . a trial judge with an individual calendar is charged with the duty of moving his cases expeditiously. . . .").

[38] 503 F. Supp. at 793 (quoting Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. Cal. L. Rev. 220, 243 (1976)).

[39] Fed. R. Evid. 612.

testifying."[40] That means that if one gives a witness — perhaps an expert witness — written materials in order to prepare him, the opponent is entitled to see and use those materials.[41] The rationale is that the cross-examiner should be permitted to inquire into how the witness reached his present testimonial knowledge and whether that knowledge was stimulated at or before trial.[42]

Many, if not most, writings used to refresh or prepare testimony would be discoverable anyway under appropriate provisions of the Federal Rules of Civil Procedure.[43] But what if materials given the witness are privileged? Are they non-discoverable work products under, for example, federal rule of civil procedure 26(b)(3);[44] or do they constitute communications which fall under the attorney-client privilege?[45] Apparently rule 612 takes precedence over the privilege according to a growing number of decisions.[46] If such writings are used to prepare a witness, the privilege may be waived.[47] Moreover, the rights afforded the adverse party under rule 612 apply not only to preparation for trial testimony, but apply as well to preparation for depositions.[48] So documents used to prepare a witness for an

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[40] *Id.*

[41] *See, e.g.*, Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8 (N.D. Ill. 1978) (waiver of attorney-client privilege through use of document to refresh witness' recollection prior to deposition.).

[42] *See* FED. R. EVID. 612, Advisory Comm. Notes.

[43] FED. R. CIV. P. 26(b) (provides for discovery of relevant, non-privileged material, including material used in preparation for trial, with the exception of certain materials); FED. R. CIV. P. 34 (provides for the discovery of "documents and tangible things" and entry upon land for inspection); FED. R. CIV. P. 35(b) (allows for the discovery of medical reports).

[44] FED. R. CIV. P. 26(b)(3). Rule 26(b)(3) relaxes the restriction against the discovery of materials prepared "in anticipation of litigation or for trial" by the other party's representative, including attorney, consultant, insurer, indemnitor or agent, only in those instances where the party seeking discovery can show "substantial need" along with a hardship in obtaining the materials by other means. However, this waiver specifically excludes "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*

[45] FED. R. CIV. P. 26(b)(1) provides, in part, that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter. . . ." *Id.*

[46] Williamson v. Puritan Chem. Co., No. 80 Civ. 1698(RWS) (S.D.N.Y., March 6, 1981); Ramsey v. County of Fresno, 7 Fed. Evid. Rep. 950 (E.D. Cal. 1980); Marshall v. United States Postal Serv., 88 F.R.D. 348 (D.D.C. 1980); R.J. Hereley & Son Co. v. Stotler & Co., 87 F.R.D. 358 (N.D. Ill. 1980).

[47] *See* notes 49-51 and accompanying text *infra*.

[48] Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, 81 F.R.D. 8 (N.D.

oral deposition may be seen by the opponent.

At least seven federal courts have held that waiver results when privileged material is used to refresh recollection.[49] Moreover, although rule 612 refers to writings used to "refresh memory," these decisions draw little distinction between materials shown to prepare testimony as opposed to materials used to actually help refresh recollection. The effect of the cases is to make rule 612 into a rule of discovery covering almost everything shown to a witness prior to his testimony.

Bailey v. Meister Brau, Inc.[50] and *Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories*[51] are two early examples of the scope of the evidence rule. Both cases involved experts who used documents to prepare deposition testimony. Defendants sought production of all materials used by the experts to refresh their recollection and prepare for the deposition. These documents included summaries of conversations between the plaintiff-client, his attorney and one expert. They included documents prepared by plaintiff's attorney detailing the best way to present aspects of the case at trial. They included an attorney's file labelled "communications with clients" which had been reviewed by one witness several months before his testimony. In both cases production was compelled.[52] Any claim of

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Ill. 1978); Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972).

[49] Williamson v. Puritan Chem. Co., No. 80 Civ. 1698 (RWS) (S.D.N.Y., March 6, 1981) (witness who refreshed recollection prior to deposition waived attorney-client privilege); Ramsey v. County of Fresno, 7 Fed. Evid. Rep. 950, 954-55 (E.D. Cal. 1980) (witness refreshing recollection prior to deposition waived attorney-client privilege); Marshall v. United States Postal Serv., 88 F.R.D. 348, 350 (D.D.C. 1980) (waiver of privileges through refreshment of recollection cited as a "general proposition"); R.J. Hereley & Son Co. v. Stotler & Co., 87 F.R.D. 358, 359 (N.D. Ill. 1980) (where at a settlement meeting the witness relied on memorandum to refresh his recollection, read portions of it aloud, and handed it at one point to an adverse party's representative, attorney-client privilege was waived); Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, 81 F.R.D. 8, 9 (N.D. Ill. 1978) (when witness refreshed recollection prior to deposition, attorney-client privilege waived); Peck & Peck, Inc. v. Jack LaLanne Fifth Ave. Health Spa, Inc., No. 76 Civ. 4020 (CSH) (S.D.N.Y., Jan. 12, 1978) (witness refreshing recollection at deposition waived work product privilege); Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972) (when witness refreshed recollection at deposition, both attorney-client privilege and the work-product doctrine were waived). *Cf.* Jos. Schlitz Brewing Co. v. Mullen & Phipps (Hawaii) Ltd., 85 F.R.D. 118 (W.D. Mo. 1980) (privilege not waived).

[50] 57 F.R.D. 11 (N.D. Ill. 1972).

[51] 81 F.R.D. 8 (N.D. Ill. 1978).

[52] Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, 81 F.R.D. at 10-11 (N.D. Ill. 1978); Bailey v. Meister Brau, Inc., 57 F.R.D. at 13 (N.D. Ill. 1972).

privilege was waived by use of the documents to prepare testimony.

One case which denied production of work product is *Berkey Photo, Inc. v. Eastman Kodak Co.*[53] However, the opinion in this case is no consolation to one who opposes production. Judge Frankel in the Southern District of New York denied disclosure of four volumes of attorney's notebooks which were used to brief plaintiff's expert. Why this result? Because, explained the court, the scope of rule 612 had not yet dawned upon the bar, and some fair notice should be given before a waiver of important privileges is imposed.[54] But, henceforth, warned Judge Frankel, if counsel delivers work product or other privileged documents to a witness, disclosure should be expected.[55]

More recently, the United States District Court for the Eastern District of California, in *Ramsey v. County of Fresno*,[56] admonished that "counsel cannot have it both ways!"[57] The court ruled that a document may be protected as work product only if the attorney limits its use to the preparation and prosecution of the case. If the attorney uses the documents to refresh the recollection of his witnesses, "it loses whatever immunity it may have."[58]

Rule 612 must be taken seriously by trial lawyers. The technique of briefing a witness by "giving him the file" is now a dangerous practice. Clearly, counsel should not refresh deponents or witnesses with material containing the attorney's theories or thought processes.[59] On the other side of the coin, there is also a lesson for the cross-examiner. It is now standard for the adversary to ask the witness whether any documents were used to prepare his testimony and to require their identification — all as a prelude to a demand made under rule 612 for production.

In short, the litigator can no longer be assured of work product protection under federal rule of civil procedure 26(b)(3).

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[53] 74 F.R.D. 613 (S.D.N.Y. 1977).

[54] *Id.* at 617.

[55] *Id.*

[56] 7 Fed. Evid. Rep. 950 (E.D. Cal. 1980).

[57] *Id.* at 954.

[58] *Id.*

[59] 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 612[04], at 612-42. *See* P. ROTHSTEIN, PRACTICE COMMENTS TO FEDERAL RULES OF EVIDENCE (2d ed. 1978).

The latter provision must be read with federal evidence rule 612 as interpreted by a substantial number of trial courts.